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ARKANSAS BAR EXAMINATION
FEBRUARY, 2006

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TORTS

The Smith family reunion held near Calamity, Arkansas, is a big event. It is hosted by Big Daddy Smith on land owned by Big Daddy Farms, Inc. People come from far and wide. Posters advertising the event are put up months in advance and public service announcements are broadcast in that area of the state on the local area public television channel.

Oddball Jones is the illegitimate son of Big Daddy who has never acknowledged him. Oddball lives in an adjacent county with his wife and two kids. Oddball has been adrift in the world until recently when he started selling advertising space on yoga mats he produced. Last year he earned $500,000 after taxes. Oddball has never attended the reunion. Big Daddy never sent Oddball an invitation.

Last summer, Oddball decided to attend the reunion. He went alone, without his wife and/or kids. At the gate he saw a sign which read:

The Smith Family Reunion
Welcome One and All
Your Host: Big Daddy Farms, Inc.
Not Responsible for Loss or Injury

Oddball's presence at the event went unnoticed until he stepped on a rotten board at the boat dock and fell into the lake. The board looked solid and sound on the exterior, but it was rotten at the core. Oddball could not swim. Big Daddy's only other children, daughters, Ima and Ura, saw Oddball fall, pulled him out of the water, revived him, but he eventually died weeks later. He suffered from brain damage and did not make sense when he tried to speak while in the hospital.

You have been asked to bring suit for damages arising out of the loss of Oddball.

Question 1: What is the common name currently used for this type of lawsuit. Relate what antecedents, if any, there were for such suits in common law. What authority now exists, if any, to bring such an action in Arkansas, who brings the lawsuit, and who is likely to receive what elements of damages, assuming the case were to be successful.

Question 2: What cause(s) of action would you assert over the loss of Oddball and what are the essential elements of the claim(s).

Question 3: What are the likely defenses to be asserted to your causes of action.

Question 4: In short order, predict whether the Plaintiff or the Defendant will win and state plausible reasons in support of your conclusion.

TORTS

Question 1:

This is a survival action for wrongful death brought on behalf of Oddball. The authority to bring this type of suit in Arkansas is statutory. Under the statute the wrongful death suit must be brought by the personal administrator of the estate of Oddball. The beneficiaries of the suit are also statutory. The beneficiaries include the parents, children, grandparents, siblings, grandparents, and those that stood in loco parentis to the person that is deceased. Due to the fact that paternity between Oddball and Big Daddy was not established between Oddball and his father, the other children of Big Daddy will not be beneficiaries. However, had paternity been established, Ima and Ura would be beneficiaries as well because there is no distinction in Arkansas between children of the half blood and children of the whole blood. Therefore, they would be deemed siblings and as such would be beneficiaries. In addition, even if paternity had been established, Big Daddy would not be entitled to recover because a person is precluded from profiting from their own wrong and the accident happened as a result of Big Daddy's negligence. The elements of damages for a wrongful death action include the economic losses as a result of the death, pain, suffering and mental anguish, the medical expenses incurred as a result of the accident, the loss of companionship and services to the beneficiaries as result of Oddball's death, loss of the value of the deceased's services to the beneficiaries, and after March of 2003, the estate of Oddball can recover for loss of life damages. Loss of life is the amount that the deceased would have put on their own life. It is eseentially the value of a person's life to themself. This is a difficult number to calculate and normally requires an expert to value the deceased's life. The lost earnings could be determined by taking Oddball's age and using an actuarial table to calculate how long is would have been presumed to natural live and multiplying that number by his average income and reducing the total to present value.

Question 2:

I would assert a neligence claim. The elements of negligence are duty, breach of that duty, causation, and damages. In order to establish negligence the plaintiff must first establish that the defendant owed a duty to the plaintiff and what that duty is. In negligence cases concerning a landowner's liability the duty of care owed by the landowner depends on the status of the injured person. The status of the injured person may be invitee, licensee, or trespasser. An invitee is one that comes onto the landowner's property for the benefit of the landowner such as a customer in a business. A licensee is one that comes onto the landowner's property for their own benefit such as a plumber. A trespasser is one that has no right to be on the property. A duty of care that a landowner has to an invitee is one of reasonable care. The duty of reasonable care means the landowner has a duty to discover and warn of harmful conditions. A landowner only owes a licensee a duty to warn of a dangerous condition that is known or should have been known to the landowner.

A landowner owes no duty of care to a trespasser in most circumstances other than to not willfully harm the trespasser. However, if the landowner knows of a dangerous condition and he knows of

the trespasser he must warn of the danger. In this case, Oddball was a licensee because social guests are licensees because they are on the landowner's property for their own benefit. The duty of a landowner to a licensee is to warn of dangers that are known or should have been known to the landowner and not likely to be discovered by the licensee. Though the facts point out that the wood did not look rotted, Big Daddy should have been aware of the rotted condition if a reasonable person would have known that it was rotted. In this case, Big Daddy had a duty to warn Oddball of the danger of the rotted boat dock because Oddball could not tell that the wood was rotted. It is a breach of the duty of care owed by landowners to Licensees not to warn of hidden dangers that they know or should know of on the property. Causation is a two-prong test established by but for causation and proximate cause. But for the rotted wood then Oddball would not have fallen in the lake. Proximate cause is the legal cause of the harm. If the harm resulted from the natural flow of the tort then proximate cause will be satisfied absent any intervening cause. The proximate or legal cause is that the rotted wood is a substantial factor why Oddball fell in the lake. Damages, of course, are the fact that Oddball lost his life and his beneficiaries have lost the benefit of Oddball's life. Another factor in tort cases in foreseeability. In order for a plaintiff to recover it must have been foreseeable that the person injured could have been injured by the conduct or omission. Foreseeability is measured by the zone of danger test as set out by justice Cardozo. In order for Oddball to recover he has to have been a foreseeable plaintiff. In this case, the facts indicate that the party was announced throughout the region of the state and even though Oddball lived in another county he probably could have seen the announcements. In addition, the sign entering Big Daddy's land said "Come One Come All". Due to the advertising and welcome signs, it was foreseeable that Oddball would be there on the property. Even though Oddball was never acknowledged as family the advertising indicates that the party was not limited to family. Oddball was within the foreseeable zone of danger.

Question 3:

The likely defenses raised by Big Daddy will be that Oddball was a trespasser and not a licensee. The reason for this defense is that a landowner owes a lesser standard of care to a trespasser than a licensee. A landowner owes no duty of care to a trespasser than to not willfully or wantonly harm him. In this case, if Oddball is a trespasser then Big Daddy can claim that he had no duty to warn Oddball about the boat dock. In addition, Big Daddy will allege that even if Oddball is a licensee he had no duty to warn him of the rotted boat dock because the condition was unknown to Big Daddy and he had no duty to discover the dangerous condition. The facts indicate that wood did not look rotted so a reasonable person should not have known that it was rotted. Furthermore, Big Daddy will allege parent child immunity. In Arkansas, there is no spousal immunity but there is parent child immunity. Under this doctrine the child cannot sue the parent for other than intentional conduct on the part of the parent or child. In addition, Big Daddy will allege that the sign served as a disclaimer of liability regardless of Oddball's status. However, in Arkansas the sign would probably not be an effective waiver.

Question 4:

Oddball is likely to lose because he is in fact a licensee and the duty of care to a licensee is to warn of dangers that were known or should have been known to the landowner. In this case there is not indication that Big Daddy either knew or should have known of the rotted wood on the boat dock that constituted a dangerous condition. The facts indicate that the wood looked sound. As such, Big Daddy would have had to seek out the dangerous condition in order to find it. There is no duty for the landowner to discover the danger. The boatdock was not known to Big Daddy to be rotted and as such he had no duty to warn Oddball. Since there was no breach of duty by Big Daddy to Oddball then Oddball will not recover for negligence.

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2 Pages
PROPERTY

John Smith's mother and father, Burt and Ima Smith, owned 1000 acres of pristine Arkansas hardwood forest land. The property was previously owned by John's grandfather and grandmother and, before them, by John's great-grandfather and great-grandmother. John lived with his parents in the family home on the land during his formative years. The home itself provided shelter to the Smith family for three generations.

John, however, longed for the excitement of New York City and was anxious to move there. His parents decided to move and live in a small condominium since they could no longer keep up "the place" in rural Arkansas. John had long been promised by his parents that, like all generations before him, he would eventually receive the land. In fact, his mother and father told him over a cup of hot chocolate on a cold winter evening that they intended to transfer ownership of the land to John soon, before they moved to their new condo at the Residences of the Fountain of Youth.

John immediately had visions of living in New York City, but after visiting the Big Apple learned he could barely afford a third floor walk-up apartment in the theater district. It dawned on John that since he would soon own the family land, he would just find a buyer now, discount the price of the land and quickly move to New York City before Christmas. John advertised the property and immediately found a willing buyer. John explained his circumstances. The sale was closed and a Quit Claim Deed was signed by John and delivered to the buyer, Fred Sycamore. John fulfilled his dream by moving to New York City at Christmas time.

Meanwhile, Fred Sycamore contacted Burt and Ima to confirm their departure date from the family home place. Fred then learned that Burt and Ima had decided to stay and live out their days on "the place." Not surprisingly, Fred immediately sued John, Burt and Ima claiming that he, Fred, had a deed and owned "the place." Sadly, during the lawsuit, but before the judge made a decision, Burt and Ima died of broken hearts.

You are the judge in this lawsuit and are being asked to answer the following three questions:

1. Did the Quit Claim Deed signed by John, delivered to Fred and later filed by Fred with the appropriate clerk convey title to the land to Fred? Rule on the question and then explain the rationale for your decision.

2. Burt's Last Will and Testament and Ima's Last Will and Testament each devised and conveyed title of "the place" to John as has been done by the Smith family generation after generation. John, disgusted with life in New York City and longing for a taste of the old days, changed his mind after his parents' passing and decided he would return to "the place" to continue the family tradition. Since John did receive title to "the place" after he executed the Quit Claim Deed to Fred, the attorney for Fred in the lawsuit argued that the after-acquired-title-doctrine clearly made the Quit Claim Deed effective to transfer ownership of "the place" to Fred.
   Is Fred's attorney correct that the Quit Claim Deed, coupled with John's acquiring title to "the place" after the execution of the Quit Claim Deed, meant that Fred now owned title to "the place?" Make your ruling and explain your rationale.

3. Fred received a loan from Right Fast Cash to purchase "the place" from John and signed a mortgage to secure the loan. Fred decided not to make any payments on the loan since he was not able to move onto "the place." As you would expect, Right Fast Cash joined in the lawsuit seeking to foreclose its mortgage.
   Does Right Fast Cash have a valid lien on "the place?" Provide your ruling, then explain the rationale for your decision.

PROPERTY

Question 1:

Title did not pass at the time of the quitclaim deed. At the time of the execution of the quitclaim deed, John did not have any right in the place. Under a quitclaim deed a seller relinquishes any and all rights to the property to the buyer. As such, John quitclaimed whatever interest he had in the

place to Fred under by the quitclaim deed. Under a quitclaim deem the buyer holds whatever interest the seller had. John had no interest so Fred had no interest.

Question 2:

After John acquired title to the place, the after acquired title doctrine does not operate to vest title in Fred due to the use of a quitclaim deed. A quitclaim deed only conveys whatever interest the seller has to the buyer at the time. John did not have any interest and as such he did not convey any interest to Fred. However, had John used a warranty deed the result may be differed. A warranty deed contains covenants of title including the covenant to defend the seller's title against any adverse claim. If there had been a warranty deed then the doctrince of after acquired title along with the covenants contained in the warranty deed would have put title in Fred.

Question 3:

Right Fast Cash does not have a valid lien on the place. In order for a mortgage to be valid the mortgator must have an interest in the property that he grants a mortgage in. Arkansas is a title state as to mortgages. When a mortgage is granted the mortgatee acquires title in the property of the mortgator that is subject to the mortgage. In order for the mortgatgor to grant title in the mortgagee he must have had title himself. In this case Fred did not have title to convey at the time of the mortgage. Fred did not have an interest in the place at the time of the mortgage as stated above. A mortgator cannot grant in interest in someone else's property. Therefore Right Fast Cash does not have a valid mortgage in the property.

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WILLS, ESTATES, & TRUSTS

Paul and Mame had a daughter, Samantha, in 1970, and Mame died in 1980. Paul owned a business but sold it in 1990 for $250,000. Paul then invested the entire proceeds in a business proceeds account in Paul's name at his bank. (For purposes of this question, the account did not bear interest.)

Paul married Wilma in 2000 and bought a house that same year from assets other than his business proceeds account, and the title to the house was in Paul and Wilma's names as husband and wife.

In 2001 Paul and Wilma adopted Chester, age 17.

In 2003 Paul withdrew $100,000 from his business proceeds account and created a joint bank account in the names of Paul and Samantha.

In 2005 Paul executed a properly prepared and valid last will and testament leaving all of his property, real and personal, to Chester. Paul did mention both Samantha and Chester in his will as his only two children and also mentioned Wilma as his surviving spouse, but Paul did not devise or bequeath any of his property to either Samantha or Wilma under the terms of his will. Paul's will also contained a residuary clause vesting all remaining property of the decedent's estate to Chester.

Paul died in 2006, had been married continuously to Wilma since 2000, and owned no property other than what is mentioned above.

1) What property in the decedent's estate is subject to distribution under the terms of Paul's last will and testament? Please explain.
2) What property under this fact situation is Samantha entitled to? Please explain.
3) What remedies are at Wilma's disposal to seek a portion of Paul's estate, and what portion, if any, might Wilma be entitled to? Please explain.
4) If Wilma does have a remedy to successfully obtain a portion of Paul's estate, what portion of the estate does Chester receive?

WILLS, ESTATES, AND TRUSTS

I.

The only property which is subject to distribution is the $150,000 business proceeds account. At issue is what of Paul's property can be distributed pursuant to his last will and testament. In this case, it is easier to look at each property separately.

- $150,000 business proceeds account → Paul was the sole owner of this account. As such, he had an interest in the property at the time the will was executed and he could convey this interest in his will. (The business proceeds account is only $150,000 because Paul had withdrawn $100,000 to create the joint bank account).

- $100,000 joint bank account → Paul and Samantha were joint owners of the bank account. Assuming the account was properly executed with right of survivorship, at Paul's death Samantha became the sole owner of the account. Consequently, the account cannot be part of the property devised to Chester in the will since Paul did not have the power to convey his interest. Specifically, a joint owner with right of survivorship cannot transfer his interest in a will unless he is the other owner predeceases him. Therefore, the $100,000 joint bank account is not part of the estate.

- The house → The house is not part of the property that is subject to distribution because it was held by Paul and Wilma as tenants by entirety. In Arkansas, if property is transferred or bought by a husband and wife, then it is held as a tenancy by the entirety unless specifically denied. There is no requirement that the deed contain the words "husband and wife" or "right of survivorship."

As such, a tenancy by the entirety can only be destroyed, in Arkansas, by divorce. Death does not sever the tenancy by the entirety, sole title merely transfers to the surviving spouse.

Consequently, the house is now owned by Wilma and cannot be subject to distribution.

II.

Samantha is entitled to $100,000 joint bank account. The issue is what property is a disinherited child entitled to upon the death of a testator. In Arkansas, there is a presumption, under the pretermitted child statute, that a child who is left out of a will is entitled to inheritance as if the testator died intestate. However, this presumption is overcome if the testator mentions the child in the will but chooses to not devise any property to that child.

In this case, Samantha was not left any of Paul's property in the will but Paul mentioned Samantha in the will as one of his children. Therefore, the pretermitted child statute is inapplicable. Nevertheless, Samantha is still entitled to the $100,000 bank account since she was a joint owner with the right of survivorship.

III.

a. Wilma can seek an elective share. In Arkansas, spouses are protected from disinheritance by the elective share statute. The elective share statute allows a surviving spouse to inherit as if the testator died intestate. The intestate share of the heritable estate for a surviving spouse depends upon if the testator left descendants. If there are descendants, then the surviving spouse is not entitled to a share of the heritable estate and can only receive dower, homestead, and family allowance.

In this case, Paul left Wilma out of the will. It does not matter that he mentioned her as his surviving spouse, she is still entitled to her elective share. However, in this case, the elective share is zero because Paul left two descendants. Therefore, Wilma would not receive any of the heritable estate.

b. Wilma is entitled to dower, a family allowance, and the house. In Arkansas, dower is given to a wife who survives her husband. Dower is distributed prior to the distribution of the heritable

estate and grants the widow a 1/3 interest in real property and a right to 1/3 of all personal property. Furthermore, a surviving spouse is entitled to a family allowance of $4000 (against creditors) or $2000 (against the estate.).

In this case, Wilma already owns the house and has the right to keep it under the deed held by Paul and her as tenants by entirety. Therefore, even though the only real property Paul left was the house, she takes the entire thing rather than a 1/3 share under her dower rights. Additionally, Wilma is entitled to a right of 1/3 personal property pursuant to her dower rights. In this case, she would receive 1/3 of $150,000 ($50,000). Lastly, Wilma is likely entitled to a family allowance.

IV.

Chester receives all of the real and personal property left after Wilma receives her share. This results in the $100,000 left in the business proceeds account minus the family allowance granted to Wilma (either $4000 or $2000).

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EQUITY AND DOMESTIC RELATIONS

Sandy and Dave were married just shy of ten years. Unfortunately, Dave has now filed for divorce. They have two children, ages 3 and 7, whom they both love dearly. At the divorce hearing, it is determined that the parties have been separated for a year. Sandy elected not to pursue a career, and Dave has been the primary breadwinner. Dave wants custody of the two children, primarily so that he won't have to pay child support, and Sandy wants custody and alimony. It is also learned that the children have been living with Sandy since the parties' separation, and that Sandy plans to marry Bob as soon as she can get rid of Dave. Sandy and Bob also claim that the youngest child is the product of Sandy and Bob's relationship three years ago.

Please answer *each* of the following questions:

1. What is considered in determining who is the father of the youngest child?

2. What is the standard the court uses in determining custody?

3. Besides the moral fitness of the parents, please list *three more* (and only three more) factors the court should consider in determining custody.

4. Is the court justified in awarding custody to Dave because Sandy had an extramarital affair? If the court awards custody to Dave, can he get both children?

5. Is the court justified in considering the fact that Sandy was unfaithful in determining alimony payments? Regarding Sandy's request for alimony, what is the strongest argument you could make on Dave's behalf, given the fact pattern before you?

EQUITY AND DOMESTIC RELATIONS

1. In Arkansas, there is a presumption that a child born to a married couple is a result of that union, and the husband is the father of that child. However, this presumption may be rebutted by clear and convincing evidence that someone else is the father of that child. In that case, the putative father, the mother, and the husband may go before the court to have paternity established to show who is the natural father of the child. The court may order a DNA paternity test, which will take samples from the child and one or both potential fathers to determine paternity. In Arkansas, if that test comes back with at least a 95% probability that one is the father, then the court will take that as evidence of paternity. The court may also consider the testimony of the husband, wife and putative father to elicit facts, such as when the extramarital affair began, the age of the child, and wife's sexual relationship with both men.

2. The standard that the courts in Arkansas use to determine custody is the best interests of the child standard. In applying this standard, several factors are taken into consideration to determine what the best interests of the child may be to determine which parent will have primary custody.

3. Other factors, besides the moral fitness of the parents, that the court may take into consideration in determining custody are as follows: (1) the psychological relationship between the parents and the child, (2) the attitude of the parents toward the child, and (3) the reasonable, articulated preference of the child.

4. The court may not award custody to Dave solely because Sandy had an extramarital affair. There are several factors that weigh into the court's decision of who should be awarded custody. Here, the children have been with Sandy since the separation, which is about a year. The court considers, in determining what is in the best interests of the children, the need for consistency in the children's lives. Moreover, there is an inference to be drawn that Sandy has been the primary

caregiver because she elected not to pursue a career, and Dave has been the primary breadwinner. Further, in assessing the parent's attitude toward the children and true motives for seeking custody of the children, the fact that Dave primarily wants custody of the children so that he won't have to pay child support evidences that awarding custody to Dave may not be in the best interests of the child. In order for Dave to establish that Sandy's extramarital affair should divest her of custody of the children, Dave would need to show that Sandy's immoral behavior has in some way harmed the children or may harm the children in the future, even if that is simply by setting a bad example for his children.

Dave may be able to get custody of both children if he is found to be the father of the second child. The courts are usually unwilling to split children up between parents in custody battles. Thus, when custody is awarded, both children will be awarded to one parent. However, if the second child is not Dave's, and is in fact Bob's child, Bob will now have rights to custody of the second child as the child's natural father. In addition, if the second child is Bob's, the court will presume that it is in the best interests of the child to be with his or her natural parents. This is a hard presumption to rebut. Third parties generally cannot obtain custody of a child over the objection of one or both of the child's natural parents. In one of the few situations that the court will consider awarding custody to a third party, the third party would need to show that the natural parent abandoned or left the child with them, and did not return for an extended amount of time. In that case, the court may find that by abandoning the child, the third party's care is now in the best interests of the child. That is not that facts of this case. Here, Sandy has always been a caregiver to the children (presumably), and there are not enough facts concerning Bob to make a determination as to whether he would be a fit parent. Thus, if Dave is not the father of the second child, he will probably not be awarded custody.

5. Fault is not considered in determining the equitable distribution of property and awards of alimony. Therefore, the court in this case will not be justified in considering the fact that Sandy was unfaithful in determining alimony payments. There are four types of alimony that may be awarded to the spouse in need: (1) periodic alimony, (2) lump sum alimony, (3) rehabilitative alimony, and (4) reimbursement alimony. In this case, Sandy would probably request periodic alimony because she elected not to pursue a career, and it is not clear that she would have any means to support herself. In awarding alimony, the court may consider the needs of the parties, the age and health of

the parties, the income of the parties, the length of the marriage and the skills of the parties. Here, Sandy is in need of support as Dave was the sole source of income for the past ten years. Also, there is no indication that she has acquired any skills that would transfer to the workforce. Thus, Sandy is eligible for alimony payments.

However, Dave may argue that Sandy plans to marry Bob as soon as the divorce is final. In that event, if Sandy were to re-marry, the alimony award would be terminated because Sandy's new husband could support the family. There is no duty to support an ex-spouse that has re-married. Consequently, this would be Dave's strongest argument against alimony payments.

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CRIMINAL LAW AND PROCEDURE

PART ONE:

In the wee hours of Christmas morning, Squeezer, a local ne'er-do-well, got carried away and lifted a set of shiny silver candlesticks that formed part of the outdoor Christmas decorations at the Nob Hill home of Mr. and Mrs. Ebenezer Scrooge. Cackling with glee, he stuffed the candlesticks under his coat - which was wadded up on the seat of his 1976 Ford pickup - along with a half-smoked joint and what was left of a six-pack of Little Kings. His tires squealed as he sped off into the crisp winter night.

He had only traveled two blocks when the sound of a siren brought him back to his senses. He pulled off the road, rolled down the window, and sucked in huge gulps of the night air to try to purge the liquor from his breath.

Officer McCurdy sidled up to the window, smirking a bit because he recognized the pickup. He knew Squeezer, and figured he had to be drunk and up to no good. He always was.

Squeezer produced his driver's license. It was somewhat grimy, but it was legitimate and current. Squeezer whined that he was doing nothing wrong.

The following exchange then occurred between Squeezer and Officer McCurdy:

"You were going 37 mph in a 35 mph zone."

"Must be the tires, Officer. Being extra big ones, it affects the speedometer. I was just going home. It's Christmas, why you wanna pick on me?"

"What about those beers there on the seat, Squeezer? I can tell by the smell of your breath you've been drinking. How many have you had?"

"Aw, Officer, just two, I swear. Just two little beers. And its not real beer, anyway, its 'near beer.' Got 'em over in Oklahoma. Little Kings, they won't hardly getcha drunk, ya know."

"Hand over that six-pack, Squeezer, I want to see how many's gone out of it."

While pulling the Little Kings out of their nest in his coat, Squeezer accidentally knocked the coat away from the silver candlesticks. Their gleam immediately caught McCurdy's eye. Not something a guy like Squeezer would have.

"What's that?"

"What's what?"

"Those candlesticks. Where did you get those?"

"Oh, those. Heh, heh, heh. Not real, you see. Got 'em at Wal-Mart, Christmas present for m'girfriend."

"Mind if I take a look?"

Reluctantly, Squeezer pulled the candlesticks from their hiding place. They were embossed with the initials ES, and had a label from Tiffany's. Before Squeezer could say "Rudolph the red nosed reindeer," Officer McCurdy was reading him his Miranda rights.

After Squeezer was taken away to jail, Officer McCurdy searched the pickup and found the marijuana under Squeezer's coat.

Squeezer was charged with speeding; driving while intoxicated; possession of marijuana; and felony theft of property. After cooling his heels in jail over the holidays, he was taken before the judge on January 3, 2006, and his bail was set at $150,000.

You have been appointed to represent Squeezer. What pre-trial motion(s) will you file? What degree of success do you expect with regard to any motion(s) you may file?

PART TWO:

You lost on the pre-trial motion(s) you filed on behalf of Squeezer, and he is not interested in a plea bargain. He wants his day in court. He has admitted to you that he stole the candlesticks from Scrooge's front yard, but swears that the marijuana was planted by Officer McCurdy, and that he was not drunk. He says he can lie his way out of the candlestick thing. So you go to trial.

In her opening statement, the Prosecuting Attorney tells the jury that she will present irrefutable evidence that the candlesticks were stolen, and the only way the defendant could prove that he was not the person who stole them would be "if the defendant himself could stand up on his hind legs and look you in the eye and tell you with a straight face that he didn't take them, someone just put them in his truck when he wasn't looking. And I just don't think he can do that."

Do you let Squeezer take the stand? Why or why not? And what, if anything, do you do about the Prosecutor's opening statement?

CRIMINAL LAW AND PROCEDURE

PART ONE:

The pre-trial motion(s) to file here are a motion to suppress and a motion for discovery of at least the prosecution's witnesses and we would further move the court within its discretion to order

the prosecution to produce any and all witness statements it has in its custody. Furthermore, pursuant to the Brady Rule we would specifically request that the prosecution produce all exculpatory evidence in this matter. Also should file a motion to reduce Bail (150,000 is clearly excessive). The motion to suppress will likely be denied by the court, the motion for discovery will be granted for the prosecution's witness list, the court will probably refuse to produce witness statements in its discretion, but the court will order that all exculpatory evidence be produced. Motion to reduce Bail should be granted by the Court.

I might file a motion to sever the one trial for all of the charges being heard at once, but the Court will probably deny the motion to sever because for reasons of judicial economy it will want only one trial on all of the charges.

The first initial issue to evaluate is the stop by the police officer. An officer must at least have reasonable suspicion that the person he is stopping in an automobile has committed or is committing a crime. Reasonable suspicion is much less than probable cause. This is called a Terry stop.

Here the officer says defendant was going 37 mph in a 35 mph, technically a violation of the speeding law which arguably gave the officer reasonable suspicion to make the stop. By the time the court hears the motion to suppress, defense counsel can anticipate that the officer will also testify that the defendant was driving erratically and that this with the speeding was the reasonable suspicion to justify the stop.

The officer will next testify that the beers on the seat were within his plain view and by this time gave the officer probable cause to reasonably believe defendant had committed a crime. Once there is probable cause to make an arrest, the dominos start falling. For example, the officer has the right to search the vehicle incident to the arrest. The U. S. Supreme Court has said that the officer may search the entire passenger compartment of the vehicle for weapons or contraband. Even before seeing the beer in plain view, the officer could have ordered the defendant out of the car and administered a pat down search through the defendant's clothing for weapons or contraband.

This would have led to the inevitable discovery of the beer anyway so unlikely under any argument the Court is going to suppress the evidence of the beer.

Next, the officer was within procedure to ask defendant if he had been drinking. Not so smart defendant then admitted to drinking "just two beers." Once this was said, the officer had more probable cause to proceed with the questioning.

Defendant then voluntarily consented and handed officer the beers. The gleam of the candlesticks caught officer's eye. Defendant then said "Got 'em at Walmart..." Officer properly asked whether he could see them. Defendant consented and handed the candlesticks to officer. Once it was clear to officer that a theft was very likely, officer read defendant his Miranda rights. Officer informed defendant that "he had the right to remain silent, anything and everything he said could be used against him, you have the right to an attorney" "If you cannot afford an attorney, an attorney will be appointed."

Once defendant was taken to jail, officer searched the pickup. Defense counsel will argue that there was no reason to search the pickup because defendant was already taken away to jail. Therefore, the marijuana should be suppressed. The prosecution will argue that there was justification to search the passenger compartment of the pickup as part of a search incident to arrest as previously mentioned. Furthermore, the prosecution will argue that the car (pickup) had to be impounded and that the marijuana would have been inevitably discovered as part of the inventory search of the vehicle so the marijuana should not be suppressed or excluded from evidence as part of "the doctrine of fruit of the poisonous tree."

There are several important Arkansas criminal law and procedures to be sure to remember here. First, the defendant is entitled to a 12 person jury and the verdict must be unanimous. The prosecution must prove each and every element of each crime that the defendant is charged with beyond a reasonable doubt. The defendant must be tried within 1 year from the date of arrest or the date of formal charges being filed, whichever is sooner, or all charges will be dismissed with prejudice. This means the defendant walks and cannot be recharged with the same offenses. The only exception is delay caused by defendant but Arkansas Supreme Court does not usually find such

a delay. In Arkansas, voluntary intoxication is not a defense to any crime, even those crimes requiring specific intent.

In Arkansas, the prosecution in pretrial discovery is required to provide to defendant a list of all of its witnesses to be called at trial. The Court has the discretion to compel the prosecution to produce all corresponding witness statements it has.

In Arkansas, the bail for a defendant has to be set in a reasonable amount. Here, bail of $150,000 seems to be clearly excessive given the seriousness, or lack thereof, of the crimes charged, and there is no evidence that this defendant poses a serious risk of flight and will not show up at trial. Therefore, the court should grant a motion to reduce the bail.

Finally, a defense on insanity is available in Arkansas to all charges and for all crimes. I would technically need to inform the prosecution that we were intending to raise the defense and this could and should be done via a pre-trial motion. Once raised, it would not be successful on these facts. Arkansas uses a combination of the McNaughton rule and ability to be able to tell right from wrong on insanity. But it is really pointless to argue insanity here but it is available.

PART TWO:

(1) Do I let Squeezer take the stand?

"No" I do not and cannot.

Squeezer has admitted to me that he stole the candlesticks. He has told me that if he takes the stand he will lie his way out of the candlestick thing. Once a defendant admits to a crime, a defense lawyer cannot knowingly allow the defendant to take the stand and knowingly lie. Here, I would have to explain to Squeezer that on my oath as an attorney, I cannot call a witness to the stand who has admitted a crime to me and admitted to me that he will intentionally lie on the stand to try and get out of it.

If Squeezer continues to insist on testifying, I would have to file a motion to withdraw as counsel and notify the court (judge) of the basis for my motion to withdraw.

Finally, I do not allow Squeezer to take the stand because generally a defendant testifying at trial is not wise unless there is a compelling reason to do so. Here, the only possible reason to allow him to testify is because he swears that the marijuana was planted by officer McCurdy, and that he was not drunk.

(2) Prosecutor's opening statement

The minute or instant that the prosecutor said "if the defendant himself could..." I would stand up in open court and make an objection. I would immediately ask for a side bar so I could make the entirety of my objection outside the hearing of the jury. If the court refused the request for the side bar or approach the bench, I would have to state that the basis for my objection was that the defendant has the absolute right to not take the stand under the U. S. and Arkansas Constitutions and that to suggest in any form or fashion, in an opening statement or otherwise that the defendant has to prove anything at the trial, is in violation of the defendant's constitutional rights.

If and depending on what the jury heard in the discussion, I would consider moving for an immediate mistrial based on improper prosecutorial conduct and since the jury had been impaneled I would ask that all charges against my client be immediately dismissed with prejudice since double jeopardy attached at the time of the impaneling of the jury. I would vigorously argue for mistrial, dismissal with prejudice and/or mistrial and I am confident that the court would grant a least some form of relief for this well thought out objection with corresponding motion for mistrial.